No. 72-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

COPELAND REFRIGERATION CORPORATION, *Petitioner*,

v.

WARRINER HERMETICS, INC., AND
WARRINER PARTS, INC., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the petition three reasons were advanced why this Court should grant the writ: (1) inconsistency of the decision with a controlling decision of this Court, (2) conflict with the decision of another court of appeals and (3) the importance of the question decided.

Respondents ignore this Court's controlling decision, *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953). By making assertions not supported by the record and asking rhetorical questions to which the rec-

ord supplies answers different from those contended for by respondents, they seek to convey the impression that what is really only one product is two and thus to avoid the rule of the *Times-Picayune* case.[1] Respondents recognize, as did the court below, the conflict between that court's decision here and the Second Circuit's decision in *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965). (Answer 6.) As for the importance of a decision that any exclusive dealing arrangement involving trademarked goods is a tying arrangement, a per se violation of the Sherman Act, respondents do not directly deny it. They could not. Most consumer goods marketed in the United States bear trademarks, and many of them are distributed under exclusive dealing arrangements. Under the ruling of the Fifth Circuit in this case, all such arrangements are in violation of the antitrust laws, without the need for inquiry into their effect or the reason for their existence; the effect must be to disrupt many established distribution schemes.

Respondents suggest that even if all of the arguments made in the Petition for Certiorari are correct, a re-

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[1] The record supplies many answers to the question at page 5 of respondents' Answer: "If the franchise were not valuable separately from the Copeland compressor, then why was Petitioner so successful in intimidating its franchisee Thermal into cancelling the contract with Warriner to rebuild Copeland compressors?" Among other reasons given by the record for Thermal's cancellation of its embryonic relationship with Warriner are poor quality (R. 631-36), excessive freight charges (R. 628-29), and the fact that Warriner never rebuilt a complete line of Copeland compressors, omitting from its line the high speed Copelaweldo which make up the bulk of the compressors used for air conditioners and heat pumps (R. 599-600, 661-62). This last, of course, eliminated Warriner from a very significant part of the market in the hot and dry Southwest.

mand to the trial court would still be necessary because of other errors found by the Fifth Circuit. This suggestion, however, entirely misrepresents the Court of Appeals' opinion: It is clear that the decision below dealt only with the alleged tie of the Copeland "franchise" to rebuilt compressors and replacement parts. It did not deal with other alleged per se violations. We now turn to matters that are raised in respondents' answer.

1. Respondents attempt to avoid the acknowledged conflict between the decision below and the Second Circuit's *Susser* decision by drawing a distinction between trademarked machines and trademarked softgoods. (Answer 6-7). There is no basis in the cases for such a distinction. Contrary to respondents' assertion that in *Susser* machines were distinguished from fast food,[3] the Second Circuit unanimously agreed that exclusive dealing requirements involving trademarked items were not tying arrangements, without regard to what those products were, even when the trademark itself had an independent economic existence. 332 F.2d at 517. It was only the exclusive dealing requirements involving nontrademarked items, such as ice cream cones and paper napkins, that the court believed to involve tying. *Id.* at 511. The distinction between machines and food proffered by respondents for the first time in this Court has never been relied upon by any court to hold that an exclusive dealing agreement involving food was not a tying arrangement but that an

[3] The language relied upon by respondents as support for their claimed distinction is in fact directed to the issue whether an admitted tying arrangement can be justified, not to the issue whether a tying arrangement exists at all. 332 F.2d at 512, 530. No such claim of justification is now before this Court.

identical agreement involving machines was. Certainly none of the cases cited by respondents (Answer 7) supports such an odd distinction.[3]

2. Respondents argue that the opinion of the court below amounts to a wholesale condemnation of the way the trial court submitted to the jury a whole series of allegations of violations of the antitrust laws under the peculiar Texas special issue practice. According to respondents, the 9 pages of the Federal Reporter (463 F.2d at 1007-16; see Pet. 10a-26a.) that are devoted to the court's discussion of an alleged tie between rebuilt compressors and replacement parts, on the one hand, and a trademark license, on the other, contain an analysis merely of one example of several antitrust violations, all of which were, in respondents' view of the opinion, improperly submitted.

The bearing that respondents' reading of the opinion below might have on the disposition that this court should make of Copeland's petition is nowhere explained by them. Presumably they mean to suggest that resolution in favor of Copeland of the question Copeland has presented here could not call for reversal of

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[3] Copeland does not suggest, as respondents say (Answer 6.), that no tie-in between a trademark and other items can ever be a per se violation of the Sherman Act. (Answer 6.) What Copeland does claim is that before such a tie-in can be found, it must be shown that the trademark has economic life independent of any product to which the trademark might be applied. Copeland has urged with, we believe, reason that one can much more readily find that a fast-food franchise trademark has an existence separate from the physical products sold under the mark than one can find that a trademark of, say, a refrigerator compressor is separate from the compressor so as to have the two products needed for a tie-in sale. (Pet. 9-11.) The reverse proposition urged by respondents is bizarre on its face.

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the judgment below and therefore the question should not be reviewed. There is no merit to any such suggestion—if it is intended by respondents—because their reading of the Court of Appeals' Opinion is quite wrong.

Nowhere in the opinion is there even the suggestion that the court intended to rule that other alleged per se antitrust violations had been improperly submitted to the jury. Moreover, the court expressly recognized that respondents' basic complaint was their alleged inability to sell to "the franchised wholesalers and rebuilders of the Copeland system." (Pet. 6a.) Clearly the one violation alleged by respondents that was at the heart of that alleged inability to sell was the claimed tie of the Copeland "franchise" to replacement parts and rebuilt compressors. None of the other claimed per se violations, taken separately or together, could conceivably result in the market foreclosure alleged by respondents.

The focus of the court's attention thus was upon the allegations of both parties respecting Copeland's alleged exclusive dealing practices. It was not upon the doctrinal accuracy of the entire set of special interrogatories to the jury. It is noteworthy that respondents are able to convey the impression that the court may have had the broader focus respondents attribute to it only by setting forth a misleadingly incomplete quotation from the court's opinion that is torn from its context. The complete quotation, from which respondents at page 7 of their answer extracted only the italicized portion, makes it clear that the court's only concern was with Special Issue 3(c), dealing with the

wholesaler and rebuilder exclusive dealing arrangements.

> "Because *we focus our attention in this opinion upon the doctrinal accuracy of the trial judge's special interrogatories to the jury,* we outline here Copeland's legal defense of its franchising practices." (Pet. 8a.)

The court then went on to summarize only Copeland's defenses to the exclusive dealing aspects of its arrangements with its wholesalers and rebuilders—not its defenses to any of respondents' other charges. The court made no mention whatever of those defenses, although that would be expected if in fact the court intended a general survey of all of Copeland's alleged per se violations.

To make perfectly clear the precise limitations of its holding, the court recapitulated the results of its eleven pages of analysis of Copeland's "franchising practices":

> "The plaintiffs were entitled to have the jury instructed that Copeland's policies of barring its franchised wholesalers from dealing in compressors rebuilt by non-authorized rebuilders and of barring its franchised rebuilders from obtaining parts from non-Copeland sources, if proved by a preponderance of the evidence, constituted *per se* violations of the Sherman Act without the necessity of proof of 'unreasonableness' and 'anticompetitive effect'. *Special Issue Number 3(c) did not so inform the jury.* This required reversal of the judgment entered below, and remand for another trial before a jury instructed to this effect." (Emphasis added) (Pet. 27a.)

It simply was not possible for the court to state more plainly that it was reversing solely on the ground that,

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in its opinion, the question of the alleged tying arrangement involving the franchise, rebuilt compressors and replacement parts was improperly submitted to the jury. Indeed, as respondents point out (Answer 9), the court specifically noted that it did not rule on the many other errors assigned in respondents' brief. In the court's view, some were procedural errors not likely to recur and others were inconsequential. (Pet. 28a.)[4]

3. Respondents attempt to minimize the effect of the decision below by asserting that it relates only to the drafting of "special issues," used almost exclusively in Texas. They ignore the growing use of special interrogatories, under Rule 49 of the Federal Rules of Civil Procedure, throughout the federal trial courts, especially in complex cases such as this one. *See, e.g., Ford Motor Co.* v. *Mathis,* 322 F.2d 267 (5th Cir. 1963); *Cote* v. *Good Bros,* 181 F.2d 146 (3d Cir.), *cert. denied,* 340 U.S. 826 (1950). The Chief Judge of the Fifth Circuit has noted their utility and has called for their greater use in all District Courts. J. Brown, *Federal Special Verdicts: The Doubt Eliminator,* 44 F.R.D. 245 (1967). The "special issues" given the jury in this case are indistinguishable in form from "special interrogatories" given in antitrust cases by other federal district court judges.

More than that, the court's opinion does not deal with a mere matter of "drafting." It holds, for the first time in any federal court, that a trademark holder

[4] Why respondents recite at length all the questions they raised below (Answer 9-11) is hard to fathom. If this Court reviews the decision of the court below on the only issue that is presented here and reverses its judgment, respondents of course will have the opportunity to press again below all the remaining questions, including the procedural and inconsequential ones.

cannot prevent its distributors from dealing in competitive products, even though the manufacturer may be able to prove as a matter of fact that it was reasonable to do so or that competition was not affected adversely by the requirement. That this holding will have effects far beyond the drafting of special issues in Texas is obvious. At the level of litigation, it will require changes in the oral instructions all judges would have given to juries in exclusive dealing cases prior to the date of the decision below, even in those courts where special interrogatories are not normally given. In the market place it will require substantial changes in the relationships between manufacturers of trademarked items and their distributors. In short, the decision below announces a significant change in the law. Its effects are in no way minimal.

CONCLUSION

For the reasons stated the petition for certiorari should be granted.

Respectfully submitted,

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